

IBJAAISSC2 Conference

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

v.

17 CR 74 (CM)

IBRAHIM ISSA,

Defendant.

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New York, N.Y.
November 19, 2018
11:00 a.m.

Before:

HON. COLLEEN MCMAHON,

District Judge

APPEARANCES

GEOFFREY S. BERMAN

United States Attorney for the
Southern District of New York

JAMES LIGTENBERG

SARAH PAUL

Assistant United States Attorney

BEN BRAFMAN

Attorney for Defendant Issa

JOSHUA KIRSHNER

Attorney for Defendant Issa

1 (Case called)

2 MR. BRAFMAN: I want to make our morning easier.

3 THE COURT: I want the tank team to put its
4 appearances on the record again.

5 MR. LIGTENBERG: Jim Ligtenberg and Sarah Paul, for
6 the government.

7 THE COURT: Great. Good morning.

8 OK. Mr. Brafman, you want to make my morning easier?

9 MR. BRAFMAN: Yes. We've provided you with the book
10 with exhibits stamped one through 72. I don't think that any
11 of them in our judgment are going to be controversial. I do
12 want to refer your Honor to the Court's order of findings of
13 fact dated November 16, 2018, because before we do that we need
14 to I think amend one fact that your Honor found and I'll be
15 brief.

16 THE COURT: You may want to amend one fact that I
17 found. I may not want to amend one fact.

18 MR. BRAFMAN: I want to call it to your attention.

19 THE COURT: I don't have a copy of it. I need to open
20 it. Thank you. As you might imagine, it had not been my
21 attention to write. Then about two o'clock Friday afternoon I
22 said that I won't be fair but I did. That document came into
23 very quickly on Friday afternoon.

24 All right. What would you like me to change?

25 MR. BRAFMAN: Refer to paragraph 18 of the document of

1 the order, "findings of fact".

2 THE COURT: Yes.

3 MR. BRAFMAN: You say at some point between May 27 and
4 June 10, 2014, most likely at the meeting referred to in Grand
5 Jury Exhibit A, as Government Exhibit A that's occurred next
6 week doing the first week of June, the decision was made that
7 First Star would indeed file an amended tax return.

8 I believe that has to be pushed out to August 13.

9 THE COURT: No.

10 MR. BRAFMAN: Let me just show your Honor one exhibit
11 that we're going to discuss today and you'll see why.

12 THE COURT: But you didn't introduce it at the
13 hearing.

14 MR. BRAFMAN: We did, your Honor. Defendant's exhibit
15 12 at the hearing, it was introduced.

16 THE COURT: OK. Yes.

17 MR. BRAFMAN: There's still on August 13, discussing
18 with the Kovel accountant the discussion to decision to amend
19 and just being told we do not have to file a petition in tax
20 court. The deadline for a filing an amended return is March
21 15th. I think we should meet with Paul to go over the amended
22 return. So clearly on August 13 --

23 THE COURT: No. That's not how I read it at all
24 because let's read the whole series. The whole series of
25 e-mails that are Exhibit 12, starting with the first e-mail on

1 July 10, these are all e-mails where they are, where Daniela
2 Silva is providing Mr --

3 MR. BRAFMAN: "Tsamulatis".

4 THE COURT: Mr. Tsamulatis with materials for the
5 corporate tax return. Most of them are headed "corporate tax
6 return". They are all about materials or corporate tax
7 returns. They are not copied to Mr. Ambrose. He is not on any
8 of those e-mails. And of course corporate tax return 86, we're
9 still trying to get them. How are we being to do the
10 bookkeeping without the years of information back up?
11 August 11 says: Hi Chris. The due date to send the amended
12 tax return is 8/17/14.

13 The decision had clearly been made and the August 13th
14 e-mail that's copied from Chris that's copied to Ambrose said,
15 I just spoke to Paul. He informed me he received a response.
16 He does not have to file a petition in tax court.

17 So Mr. Ambrose had obviously asked the IRS if it was
18 necessary to file a petition in tax court since they were
19 planning to file an amended return. That's how I read it. Had
20 you asked questions of Mr. Ambrose, he might have disabused me
21 of that notion but I doubt it. That does not mean that the
22 decision had not already been made. This was about filing a
23 petition in addition to an amended return.

24 MR. BRAFMAN: But the amended return had not been yet
25 finalized for filings. That's the crime.

1 THE COURT: You have your exception. Tell the fell
2 the Court of Appeals if you are unlucky enough to get there
3 that I was wrong and that the real decision to file an amended
4 tax return was not made in the first week of June but in the
5 second week of August. Go right ahead. You have that argument
6 preserved for you for your appeal. I will not be changing my
7 finding. I read this stuff too.

8 MR. BRAFMAN: I understand.

9 THE COURT: OK.

10 MR. BRAFMAN: Your Honor, I want to begin if I can,
11 you asked us to identify. We have prepared a notebook to make
12 it easier. So a copy has been given to the government. But I
13 have a preliminary question. There are a series of e-mails
14 that are merely communications trying to set up meetings with
15 Mr. Ambrose and Mr. Tsamulatis. And I am not certain whether
16 it matters in the final analysis but they are meetings which
17 would be, I think, represent decisions by Mr. Issa to hire an
18 accountant and a criminal lawyer, and I think those should be
19 suppressed as well.

20 THE COURT: Can we go through these
21 document-by-document, please? That's the only thing I want to
22 do. I don't have time to do anything else.

23 MR. BRAFMAN: Document One, Exhibit One --

24 MR. LIGTENBERG: If I may, your Honor? The government
25 is willing to agree on one through 19.

1 MR. BRAFMAN: I'm sorry?

2 THE COURT: One through 19 fall within the Kovel
3 privilege.

4 MR. LIGTENBERG: Yes, your Honor.

5 THE COURT: Great. I like that. So one through 19
6 we're all agreed, fall within the Kovel privilege and the
7 government will argue as to -- I don't know -- some or all of
8 them, that they fall within the crime fraud exception. The
9 government needs to identify for me and for Mr. Brafman whether
10 there are any e-mails in those 19 sets of e-mails or any
11 documents that, as to which it will say the crime fraud
12 exception does not apply.

13 MR. LIGTENBERG: Your Honor, we will take a look and
14 enlighten the Court.

15 THE COURT: Please do that by the end of the day. I
16 don't want Mr. Brafman punching in the dark any more.

17 OK. So we're all the way up to 20.

18 MR. BRAFMAN: So 20, your Honor, is an e-mail dated
19 May 21. The subject is corporate taxes under Ibrahim Issa's
20 name. I understand that there are other corporations in play.
21 But this includes, obviously, the one document that's charged
22 in the indictment which is the 2012 return. And the fact that
23 it's labeled plural should not be the end of the discussion.
24 The Court's required to apply discretion and common sense when
25 you are talking to an accountant at the beginning and can't be

1 bound by how someone labels on e-mail.

2 THE COURT: Let me ask the government a question. Why
3 isn't everything up to about the 8th or 10th of June Kovel
4 privilege?

5 MR. LIGTENBERG: Your Honor, for this e-mail and the
6 set the e-mails that we'll see shortly, it involves a separate
7 tax issue with New York State, not with the IRS and --

8 THE COURT: You may have that understanding but I,
9 certainly, can't tell that from reading this.

10 MR. LIGTENBERG: I think, your Honor, if we go to the
11 very next one which is number 22 and I think in subsequent
12 e-mails it becomes clear this is, A, a New York State issue
13 and, B, involves entities other than First Star. Consistent
14 with your findings of fact from Friday, Kovel is limited to
15 issues with the IRS and issues with First Star, not New York
16 state tax issues for other corporate entities.

17 THE COURT: Not New York state tax issues for other
18 corporate entities. Hang on while I get my faith exhibit, the
19 Kovel letter out.

20 MR. BRAFMAN: To amend 2012 requires you to look at
21 the New York State tax liabilities. You can do it in a vacuum.

22 THE COURT: There's something to what Mr. Brafman
23 says. I mean, that's why it seems to me that we have a bulk
24 issue up until the decision is made and it was clearly made
25 that there's going to be an amended tax return filed.

1 MR. SOLOWIEJCZYK: Your Honor, if you turn to number
2 22 which as far as I can tell involves the very same issues,
3 you'll see that these are attached statements received from the
4 New York Department of Tax a Finance and that they are hoping
5 for assistance from the accountant in settling these lines.

6 THE COURT: This one wouldn't fall under the Kovel
7 privilege at all.

8 MR. SOLOWIEJCZYK: I believe, your Honor, that --

9 THE COURT: Mr. Ambrose isn't involved.

10 MR. SOLOWIEJCZYK: -- involves these state tax issues.
11 If you look back at number 20, these e-mails are sent within
12 two hours of each other and I believe subsequent e-mails show
13 that this e-mail chain in 20 involves the New York tax issues.

14 If you also flip through after the e-mail on number
15 22, you'll see that it's the consolidated statement of tax
16 liabilities for INM Shell Service Station, Special Autocare
17 Center. I don't believe First Star is listed on any of these.
18 So this is clearly a separate state tax issue with New York
19 State that fall outside of the scope of the Kovel.

20 MR. BRAFMAN: Your Honor, if they try to introduce
21 these tax liabilities at trial there would be a relevance of a
22 403 argument anyway because he is not charged --

23 THE COURT: Right. I'd leave them out. I wouldn't
24 admit them.

25 MR. BRAFMAN: Your Honor, in fairness when you are

1 developing a relationship with a new accountant and a lawyer
2 and he is given the task of amending a tax return, you cannot
3 amend the tax return without understanding where some of the
4 money of First star Auto may have either come from or gone to.

5 THE COURT: Well, and I didn't make a reference to
6 this because I decided it was not relevant in light of the
7 literal language of the Kovel letter. But I do recall there is
8 an e-mail that I saw that was introduced at the hearing in
9 which Daniela Silva and Mr. Tsamulatis were discussing the fact
10 that the reason that, the corporation in addition to First star
11 that retained Mr. Tsamulatis separately "holdings" something or
12 other, one of the separate retainer agreements. And the reason
13 that that corporation had to file a tax return was because it
14 had received money from First Star.

15 MR. BRAFMAN: Yes, judge. Money from First Star
16 closed and therefore A and E would be irrelevant. So I don't
17 know if the government is giving them away. But, B, in the
18 beginning this relationship which is a couple of day, weeks
19 after being retained and before the decision is made to file an
20 amended return or a tax petition, you need to know the picture
21 and this helps the accountant decide if amending the return is
22 and Mr. Ambrose is amending the return is the right way to
23 proceed.

24 And if you look at the next e-mail on May 21 which is
25 Exhibit 23, you can see it immediately involves a discussion

1 with Paul who is Paul Ambrose recognizing that Tsamulatis and
2 Ambrose need to get some guidance here or confer and come up
3 with a game plan.

4 THE COURT: There's no way for me to know one way or
5 another whether this played into the decision whether to file
6 an amended tax return. Frankly, I intend to err on the Kovel
7 issue. I intend to err on the side of excluding, not
8 including. I think that's what I am supposed to do. And it
9 does strike me that if these do have something to do with state
10 tax issue, you are not prosecuting state -- you're not
11 prosecuting anything. You're a tank team. But your buddies
12 are not prosecuting any state tax issues and I wouldn't admit
13 them in any event and you can tell them I said that.

14 Now I suppose it is entirely possible -- and this
15 continues through 25 and 26. It's to discuss the New York
16 State tax -- of liabilities. I am looking at 26 at the top to
17 Mr. Issa and Ms. Vasquez from Mr. Ambrose with a copy to
18 Mr. Tsamulatis.

19 Good morning, Tony. I will be available after three
20 p.m. today to discuss New York statement of liabilities. You
21 will need to note the alleged tax -- filed returns or estimated
22 returns for failure to file. The taxes range from withholding
23 sales, DOL and corp. True, it's all state tax issues. But I'm
24 simply not able to break out the relevance of those to the
25 ultimate decision to file a federal return and I'm not inclined

1 to since they are not relevant anyway, unless you can connect
2 them to the federal return which I don't think is anybody's
3 plan to do. I just don't see why I should waste my time
4 agonizing over this when I can take the issue out of the case.

5 MR. LIGTENBERG: That's fine, your Honor.

6 THE COURT: One of my favorite things to do is to take
7 issues out of the case.

8 MR. BRAFMAN: Mine too, judge. Thank you.

9 THE COURT: Well, I think it goes through 27 and 28.
10 Most of which are I need to different time. When can we have
11 this meeting? You know, I'm not available from two to six. We
12 need to have a meeting.

13 MR. BRAFMAN: Right. So that's 28, 29.

14 THE COURT: Twenty-nine, 30 and we get to 30 and 30 is
15 the First Star Auto 2012 corporate taxes.

16 MR. BRAFMAN: So that's clearly Kovel.

17 THE COURT: Right.

18 MR. LIGTENBERG: Your Honor, we agree that it falls
19 within the scope of Kovel. Obviously, as mentioned earlier, we
20 reserve the right to make a crime fraud argument.

21 THE COURT: Understood.

22 MR. BRAFMAN: Number 30 comes with an attachment.

23 THE COURT: It's the attachment that gives the crime
24 fraud argument its heft.

25 MR. BRAFMAN: Correct. And if you are will note, the

1 third item on the attachment is First Star Auto. So it does --

2 THE COURT: The subject is First Star Auto. The
3 subject of the e-mail is First Star Auto.

4 MR. BRAFMAN: I understand. But I think it supports
5 your Honor's decision on the earlier e-mail because the statute
6 includes First Star Auto Repair and it's clear the accountant
7 is given the whole picture.

8 THE COURT: What's happened obviously, they started
9 with a federal tax issue. This state tax issue then a month
10 later reared its ugly head. They set up a meeting to talk
11 about that. They added to the agenda of that meeting the
12 federal tax. They probably talked about everything. I don't
13 know. I wasn't there. But that meeting took place early in
14 June and from and after that everything that Mr. Tsamulatis did
15 was as an accountant and there's no evidence in front of me in
16 connection with this hearing that we have last week that
17 Mr. Ambrose ever gave any other legal advice in connection with
18 First Star Auto's 2012 tax return.

19 MR. BRAFMAN: Yes. And I think if you look at Exhibit
20 31 and the second page I believe it's clear that that is under
21 Kovel. And I hope the government would consent because second
22 page there is a reference in an e-mail where the lawyer, the
23 defendant's agent and Mr. Ambrose are all discussing we need to
24 discuss the best response.

25 THE COURT: Well, that's the essence of the findings

1 of fact. I saw that e-mail and I said they hadn't made a
2 decision as of that point.

3 MR. BRAFMAN: Yes, your Honor.

4 MR. LIGTENBERG: Your Honor, in light of your Honor's
5 ruling with regard to the state tax issues, we're willing to
6 say at least through 35 falls within the code.

7 THE COURT: OK. Great.

8 MR. LIGTENBERG: Even with respect to 36, we agree
9 that's within Kovel. We would likely be presenting a crime
10 fraud argument.

11 THE COURT: You are reserving crime fraud arguments.
12 You are reserving relevance arguments on behalf of the trial
13 team for things that have nothing to do with the state taxes.
14 None of those arguments is being forfeited. I think it's
15 really important just to focus on Kovel.

16 MR. LIGTENBERG: Yes, your Honor.

17 MR. BRAFMAN: Then 36 should be suppressed as well.
18 That's the returns. That's the IRS advice and reference to
19 this loyalty. We agree not that it should be suppressed but
20 that it falls --

21 THE COURT: Well, the answer is it will be suppressed
22 unless it is otherwise admissible because the privilege doesn't
23 count.

24 MR. BRAFMAN: Item 37 again, your Honor, this is the
25 fourth decision and it references other companies but it also

1 references in the body of the e-mail the second paragraph, a
2 strategy for First Star response to IRS 2012 notice which again
3 points up why your Honor can't parse out what was being
4 discussed by corporation corporation. And exercising
5 discretion and just plain common sense indicates that they're
6 looking at how to amend that they need to understand what's
7 happening before they amend.

8 THE COURT: I told you that my preliminary read up to
9 the date of that meeting and I don't know if the meeting can be
10 established to say that the Kovel privilege attaches and that
11 from and after that meeting it doesn't.

12 MR. BRAFMAN: OK. And I also then ask your Honor to
13 move to 38.

14 THE COURT: Thirty-seven is obviously before that
15 meeting because no decision has been made.

16 MR. BRAFMAN: Correct. And 38 is before that meeting
17 because it's June 4 and if you --

18 THE COURT: Well, I don't know the date of the
19 meeting. I only know it took place in first week of June.

20 MR. BRAFMAN: Your Honor's order indicates that we go
21 up to June 10 because that's the first sign that you have --

22 THE COURT: That's first sign I had then.

23 MR. BRAFMAN: Right.

24 THE COURT: If I find out what the date of the meeting
25 is, I may change the date.

1 MR. BRAFMAN: I understand.

2 Your Honor, 38 if you turnover to the -- I know the
3 first page talks about hybrid corporate taxes but it's an
4 e-mail chain that begins on the bottom of page two where --

5 THE COURT: Well, it's a repeat of 37. So we don't
6 need to admit it and the rest of it has nothing to do with
7 First Star Auto. So it doesn't fall within the Kovel
8 privilege.

9 MR. BRAFMAN: But it does, judge, when you look at the
10 return First Star gave a lot of money to hybrid. That's one of
11 the problems in amending the return. And if you look at the
12 bottom of page two, the same paragraph is continued that this
13 is a strategy for the First Star response to IRS 2012 notice.
14 This is a continuing conversation. This should all be really
15 one exhibit. We've already agreed that 37 is under Kovel and
16 37 and 38 is a continuing conversation.

17 THE COURT: There's so much repetition. There is so
18 much redundancy in these exhibits. So many of them they're
19 like four or five of them that have the June 3 e-mail where the
20 Optimum Grocery Store stuff is in a bigger type font.

21 MR. BRAFMAN: You can't just --

22 THE COURT: Ah, the meeting this Thursday.

23 MR. BRAFMAN: There is a calendar entry.

24 THE COURT: The meeting took place on June 5.

25 MR. BRAFMAN: We put that into evidence, your Honor.

1 THE COURT: OK. Fine.

2 MR. BRAFMAN: Judge, there are e-mails after the
3 meeting where they're still continuing to discuss the amended
4 return.

5 THE COURT: Well, discussing the amended return is
6 different than discussing whether to file an amended return.

7 MR. BRAFMAN: Your Honor, if you look at 63 --

8 THE COURT: No. I don't want to. I want to go
9 exhibit-by-exhibit. I don't want to go to 63.

10 MR. BRAFMAN: The reason why I want you to go is to
11 inform your decision as we proceed because you are stuck on the
12 date of the meeting.

13 THE COURT: The date of the meeting was June 5.

14 MR. BRAFMAN: Yes. But what happened at that meeting?
15 If you look at Exhibit 63, the first page, they're still
16 discussing what is the update on First Cooperation taxes
17 response.

18 THE COURT: No. Sorry. I don't buy it. I don't buy
19 it. A decision was made. It's clear from the e-mails that
20 follow the June 5 meeting a decision was made to file an
21 amended return.

22 MR. BRAFMAN: Yes. But the materials continuing to be
23 forward --

24 THE COURT: They continued to be forwarded to him and
25 I said everything that's forwarded to him then is in his

1 capacity as an accountant. It doesn't fall within Kovel.
2 There is no lawyer on these e-mails. He is giving, he is being
3 an accountant. He is preparing the amended tax return. And
4 that activity does not fall within Kovel. Only the decision
5 whether the strategy will be to file a tax an amended tax
6 return or not falls within Kovel. That's legal advice.
7 Preparing a tax return is not legal advice. I couldn't have
8 been clearer about that.

9 MR. BRAFMAN: Yes. But if you look at Exhibit 70
10 which is one of the last exhibits there is still discussion
11 about whether or not the numbers are going to be decided prior
12 to filing. Your Honor, the crime is not the decision to file.
13 The crime is the return. And in this case Ambrose, Daniela and
14 Chris are all discussing with Paul that the second response to
15 the IRS, what are we going to do? How are we going to prepare
16 the return? Their argument is that the return was prepared
17 illegally. Our argument is the return was prepared.

18 THE COURT: Sorry. The due date is 8/17. They have
19 been working on the return. You can tell from the e-mails.
20 You can tell from Tsamulatis's testimony he started working on
21 the return in the middle of June. So it did come out at the
22 hearing that they sent the completed return to Mr. Ambrose for
23 his review before it was filed. It did come out. So that
24 doesn't mean that the work that was done prior to that date of
25 filling out the return is Kovel privileged work. There may be

1 a question about whether there are one or two e-mails relating
2 to Mr. Ambrose's review of the mere accountancy that was
3 performed by Mr. Tsamulatis and maybe those are the e-mails
4 that you are pointing to but that doesn't mean that
5 everything -- I am not retreating from my decision that
6 Mr. Tsamulatis's work in preparing the tax return was mere
7 accountancy. You have your exception.

8 MR. BRAFMAN: Can I just add one comment, judge,
9 because I think I know when I've lost an argument. I don't
10 want to belabor it.

11 THE COURT: Of course you do.

12 MR. BRAFMAN: But I don't want to fight with you. I
13 just want you to please recognize that the preparation of the
14 return is not the crime that's being charged. It is the filing
15 of the return. And the finalized return is not filed until
16 after Ambrose and the accountant sign-off on the decision, not
17 just to file it but to file this return.

18 THE COURT: Sorry. Save it for the circuit.

19 MR. BRAFMAN: OK. Well, they have to convict him
20 before we get to the circuit.

21 THE COURT: That's true. I always say if you are
22 unlucky enough to be there, you have this argument.

23 MR. BRAFMAN: Thank you, judge.

24 Your Honor, I'll have you agree that number 39 is
25 under the Kovel because that clearly is referenced to the

1 second letter than June 4.

2 MR. LIGTENBERG: We agree on 39.

3 THE COURT: Fine.

4 MR. BRAFMAN: Forty then would fall under the same.

5 THE COURT: It's the same e-mail over and over and
6 over again. Fort is purely redundant.

7 MR. BRAFMAN: And 41, as well.

8 MR. LIGTENBERG: Yes, we agree, your Honor.

9 MR. BRAFMAN: And 42 is a follow-up and it is now on
10 June 14.

11 THE COURT: Forty-two is June 10.

12 MR. BRAFMAN: Sorry. June 10, yes, your Honor.

13 THE COURT: From Daniela to Paul Ambrose.

14 MR. BRAFMAN: That falls within the time period
15 covered by your Honor's ruling.

16 THE COURT: Well, except look at what the -- it's
17 Ibrahim Issa taxes paid 2010 PDF, untitled attachment, Ibrahim
18 Issa taxes paid 2010, untitled attachment.

19 MR. BRAFMAN: I'll withdraw this exhibit but I reserve
20 my argument on relevance because it's got nothing do with the
21 crimes charged.

22 THE COURT: This is purely relating to state matters
23 and Mr. Issa's personal taxes and that is not comprehensible
24 within the Kovel letter. I am holding this lawyer, this very
25 fine lawyer, even tax lawyers have to be precise in their

1 language.

2 MR. LIGTENBERG: Your Honor, the government thinks we
3 can just stop right here given the meeting was on June 5 and
4 this is in chronological order. Everything here post dates the
5 decision to file an amended return. So we think everything
6 from here on out is pure accountancy consistent with your
7 Honor's findings of fact.

8 MR. BRAFMAN: But, your Honor, to be candid, your
9 Honor, I think arbitrarily cutting this off when you look at
10 June 10, the e-mail behind 43 --

11 THE COURT: Yes, I know. I am looking at the one at
12 the bottom of the page, it's to Chris from Daniela.
13 Mr. Ambrose was copied and Tony asks Chris to call him about
14 money he's transferred to other corporations.

15 There is no indication that Paul is going to be
16 involved in that. I don't see that that is Kovel privilege.

17 MR. BRAFMAN: Your Honor, the subject matter is First
18 Star 2012 tax return.

19 THE COURT: We are at a point when the decision has
20 been made to file an amended tax return. It's my finding based
21 on the evidence that I heard that that decision was made at 9
22 June 5 meeting.

23 MR. BRAFMAN: But they're talking about the exact
24 numbers coming from client to his accountant who he has a good
25 faith basis to believe is under Mr. Ambrose privilege. At that

1 point a bell does not go off and say, Mr. Issa, you are on your
2 own.

3 THE COURT: But that's too bad, isn't it? The
4 privilege doesn't last as long as Mr. Issa thinks it lasts.
5 Privilege lasts only in connection with the kind of work and
6 I'm sure Mr. Issa wasn't up on the law on this. Frankly, I
7 wasn't until very recently. The kind of work that's being
8 done, even if Mr. Ambrose tries to make it privileged. It's a
9 certain kind of work. It's not privileged. Even that work is
10 mere accountancy and that's what this is.

11 MR. BRAFMAN: Kovel accountants are doing mere
12 accountancy. They're working under an attorney.

13 THE COURT: The point is their work is privileged only
14 when they are giving advice to the attorney so that he can give
15 advice to the client.

16 MR. BRAFMAN: Yes.

17 THE COURT: The advice I find -- and I'm saying this
18 for the last time and we're not going to discuss it again --
19 was given at a meeting on June 4 when a decision was made. I
20 actually think was made a lot earlier but I am going to say it
21 was made on June 4. A decision was made that the corporation
22 First Star, the only taxpayer covered by the Kovel letter would
23 file an amended return. From and after that time there was no
24 evidence before me at the hearing and I see no evidence in this
25 e-mail that Mr. Ambrose was asked for his legal advice.

1 MR. BRAFMAN: But, your Honor, he is providing numbers
2 that go into the return.

3 THE COURT: Sorry. You've got your exception. I am
4 not going to discuss it any more.

5 MR. BRAFMAN: All right. So I have to, you know, do I
6 have to go through these or do I have an exception?

7 THE COURT: You have an exception. I think we are
8 done. The rest of them are not going to come in under Kovel
9 except if you have some e-mails from at or about the time when
10 Mr. Ambrose you know, that Mr. Ambrose was asked to review the
11 tax return that was prepared by Mr. Tsamulatis. We know he was
12 asked to look at it before it was sent in to the IRS. That
13 happened in the middle of August. So there may be some e-mails
14 that are privileged in that time period. I don't think. I
15 don't know if you can point them out to me.

16 MR. BRAFMAN: May I just have a moment?

17 THE COURT: Sure. Jim says I misspoke. Would be
18 excluded pursuant to Kovel. Never mind. Just forget that.
19 Strike that. I don't know what I said. I'm not going to unsay
20 it and resay it. I've said it enough times.

21 (Pause)

22 MR. BRAFMAN: Your Honor, if I can please look at
23 Exhibit 63. That's in August and that's from Mr. Issa and it
24 relates to corporate tax returns and one is the update of First
25 Star corporate taxes and then there is an attachment which is

1 all of the financial information that Mr. Tsamulatis is
2 submitting. I'm sorry. Has gotten from the client for the
3 preparation of --

4 THE COURT: No. Nice try.

5 MR. BRAFMAN: Your Honor, number 69 on the bottom it
6 is estate continuation of e-mail chain discussion with
7 Mr. Ambrose is specifically referenced on the bottom of that
8 exhibit.

9 THE COURT: Right.

10 MR. BRAFMAN: And it's whether or not to amend the
11 return.

12 THE COURT: No. They don't have to file a petition in
13 tax court.

14 MR. BRAFMAN: It's important that we go over the
15 numbers prior to filing. All together means Ambrose too. How
16 is that not privilege. Even if the decision was made to file
17 the return, there is a discussion among counsel and the
18 accountant.

19 THE COURT: I just said to you five minutes ago, I am
20 sure there are some e-mails as to which you will want to,
21 attorney/client privilege.

22 MR. BRAFMAN: This is it.

23 THE COURT: Because Mr. Ambrose testified that he was
24 sent the return, the fact that he was sent the return and asked
25 to look at it before it was filed, does not make the work that

1 was done in the intervening two months anything other than mere
2 accountancy but. His review of those numbers is clearly
3 attorney/client privilege. I don't deny that. I don't think
4 the government defies that.

5 MR. BRAFMAN: So are we then agreeing on 69 as being
6 either under Kovel or just privilege? And you have to look at
7 70 well?

8 THE COURT: The e-mail that would be attorney/client
9 privilege which is also the only e-mail that's not somewhere in
10 some other chain of e-mails is the e-mail at the bottom of the
11 first page from set CPA to Daniela with a copy to Paul Ambrose,
12 that's one e-mail, is the only one that would fall under a
13 potential. It's actually an attorney client privilege.

14 MR. BRAFMAN: Then that's the same e-mail in the
15 Exhibit 70, judge. It just carries forward.

16 THE COURT: No, 70 is, hi, Chris. Tony wants to go
17 over the numbers with you first before we meet with Paul. OK?
18 Tony and Chris going over the numbers is not Kovel privilege
19 because it relates to the mere accountancy work that was done
20 by Chris.

21 MR. BRAFMAN: But the privileged e-mail is right below
22 that. That's what they're responding to.

23 THE COURT: "OK. Thank you?" Oh, any place that we
24 find the "I just spoke with Paul" e-mail, it can be redacted.
25 All right?

1 MR. BRAFMAN: Yes, your Honor.

2 Your Honor, those are the materials without waiving
3 our --

4 THE COURT: You waived no objections.

5 MR. BRAFMAN: Thank you, judge.

6 THE COURT: All right. So really by the end of the
7 day it seems to me that the government should advise
8 Mr. Brafman and his team of which e-mails it would say fell
9 within the crime fraud exception. So that he has something to
10 punch at. And if I can get I guess simultaneous briefs from
11 both sides about why those fall within the crime fraud
12 exception or why they don't fall within the crime fraud
13 exception.

14 MR. BRAFMAN: Your Honor, could we --

15 THE COURT: And it's a holiday.

16 MR. BRAFMAN: But could we do it so that we get at
17 least the morning tomorrow to respond? Otherwise, we may be
18 talking about --

19 THE COURT: I was talking about next Monday.

20 MR. BRAFMAN: I'm sorry. Yes. That's fine.

21 THE COURT: It's a holiday this week, Mr. Brafman.

22 MR. BRAFMAN: I know that, judge.

23 THE COURT: I actually think people should take the
24 holiday.

25 MR. BRAFMAN: So the government is going to address

1 which e-mails?

2 THE COURT: Yes. They can tell you that tomorrow
3 early tomorrow.

4 MR. BRAFMAN: Then we can respond by -- we had a
5 pretrial conference scheduled but I think we've agreed on
6 consent and I think your Honor has scheduled it for Monday at
7 10:30. Is that correct, your Honor?

8 THE COURT: I don't know. Did we?

9 MR. BRAFMAN: A final pretrial conference.

10 COURTROOM DEPUTY: Yes.

11 THE COURT: So I'll get briefs. It'll be a useless
12 conference. Make it Wednesday, the final pretrial conference
13 at ten o'clock. Monday submit briefs. I don't want to have an
14 argument when I haven't read the papers. I just don't want to
15 do that. Frankly, I'm not going to be here this weekend.

16 COURTROOM DEPUTY: The final pretrial conference is
17 now Wednesday the 5th.

18 THE COURT: You are looking at the wrong date. It's
19 the 29th of November.

20 MR. BRAFMAN: This is the final pretrial conference?

21 THE COURT: At which time I will make a decision on
22 the crime fraud.

23 COURTROOM DEPUTY: Wednesday, the 28th at ten o'clock.

24 THE COURT: And at that moment I will make a decision
25 on the crime fraud exception.

1 MR. BRAFMAN: Twenty-eighth at ten o'clock, nothing on
2 Monday.

3 THE COURT: Except you are going to send me a brief.

4 MR. BRAFMAN: Yes, ma'am. And have a happy holiday.

5 MR. LIGTENBERG: When are the briefs due?

6 THE COURT: Monday.

7 MR. LIGTENBERG: What time?

8 THE COURT: Let's say by noon.

9 MR. LIGTENBERG: Thank you, your Honor.

10 MR. BRAFMAN: I thought we were going to be responding
11 to the government.

12 THE COURT: I said simultaneous briefs.

13 MR. BRAFMAN: Your Honor, we will also I think by
14 Monday be filing a motion to dismiss certain counts of the
15 indictment just predicated on our view of what happened in the
16 grand jury.

17 THE COURT: Well, I will rule on no motion addressed
18 to the grand jury without reading what happened in the jury.
19 So since you are going to make that motion the government
20 should bring the grand jury minutes.

21 MR. BRAFMAN: Thank you, judge.

22 THE COURT: I said I feel like a state court judge.

23 MR. BRAFMAN: I know it burdens the Court, but to be
24 honest with you, it's one of the advantages in state court
25 where at times the prosecutors has to be a little bit more

1 careful knowing it's going to be reviewed. No disrespect to
2 anyone in the courtroom, but I have found that that notion in
3 state court helps that process.

4 THE COURT: I don't disagree with you.

5 MR. BRAFMAN: Try my best.

6 THE COURT: There are many things about state court
7 that oddly I think make a great deal of sense.

8 MR. LIGTENBERG: Your Honor, just to clarify, when
9 would you like the government to have the grand jury minutes?

10 THE COURT: ASAP.

11 MR. LIGTENBERG: Thank you, your Honor.

12 MR. BRAFMAN: I think the non tank team promised a
13 list of witnesses sometime late today.

14 THE COURT: OK. Thank you all.

15 (Adjourned)

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